YYM (applying on their behalf and as litigation representative for X, a child) v Ketua Pengarah Pendaftaran Negara & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-24–5–04 OF 2022
SU TIANG JOO JC
21 DECEMBER 2022

Constitutional Law — Citizenship — By operation of law — Child abandoned by biological parents — Child born in Federation — Child adopted by Malaysian citizen pursuant to adoption order — New birth certificate of child stated that child was non-citizen — Whether child was Malaysian citizen by operation of law pursuant to art 14(1)(b) of Federal Constitution and Part II s 1(a) of Second Schedule of Federal Constitution read together with s 19B of Part III of Second Schedule of Federal Constitution — Adoption Act 1952 s 25A — Courts of Judicature Act 1964 Schedule s 1 — Federal Constitution arts 4 & 14(1)(b), Second Schedule Part II, s 1(a) & Second Schedule Part III, s 19B

The plaintiff in the present case was the litigation representative and an adopted mother of a child ('the child') who was abandoned by her biological parents at birth. The child was born in Damai Services Hospital HQ, Kuala Lumpur. Following an adoption order obtained by the plaintiff, the child was issued with a new birth certificate ('the second birth certificate') under s 25A of the Adoption Act 1952 ('the AA') but the said birth certificate stated that the child was a non-citizen. The plaintiffs then filed the present originating summons against the Director General of the National Registration Department ('D1'), the Ministry of Home Affairs ('D2') and the Government of Malaysia ('D3') for a declaration that the child was a Malaysian citizen by operation of law pursuant to art 14(1)(b) of the Federal Constitution ('the FC') and Part II s 1(a) of the Second Schedule of the FC read together with s 19B of Part III of the Second Schedule of the FC.

Held:

(1) The Senior Federal Counsel ('the SFC') must be aware of the law as laid down in the Federal Court case of *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 ('*CCH*'s case'). This was clear from the belated corrective affidavit filed by D1 who said it was filed based upon the advice of the SFC and seeking to challenge that the birth of the child took place at Damai Service Hospital HQ Kuala Lumpur, a place which was within the Federation and if accepted would trigger the presumption constitutionally provided by Part III s 19B of the

Second Schedule ('s 19B presumption') (see para 45).

(2) The court found that D1's attempt to resile from his earlier admission of the fact that the child was born at Damai Service Hospital HQ Kuala Lumpur was clearly an afterthought because the second birth certificate which stated that the child was born at Damai Service Hospital was not withdrawn by D1. Pursuant to s 25A(5) of the AA, this second birth certificate 'shall replace' the pre-adoption birth certificate and 'shall for all purposes be known as the Certificate of Birth of the child'. In addition, the adoption order also stated that the place of birth of the child was at Damai Service hospital. There was also no evidence to show that the plaintiff was lying that the child was abandoned. As such, by reason of s 19B presumption, the burden to prove the contrary had shifted to the defendants (see paras 46 & 48).

(3) With the defendants not calling the doctor named in the birth certificate, one Datuk Dr Mahes Sitampalam of Damai Service Hospital HQ Kuala Lumpur to give viva voce (oral) evidence or subjecting the plaintiff to cross examination, the court found the plaintiff had credibly denied the defendants' allegations for the reasons set out above, and that the s 19B presumption which operated in favour of the plaintiff had not been rebutted (see para 50).

(4) Based on the facts and applying the law which had been settled by the Federal Court in the *CCH*'s case which the court was bound to follow by reason of the doctrine of stare decisis, with the defendants having failed to discharge the burden of proof which lay on them to rebut the s 19B presumption, the court had no hesitation in granting the first prayer sought by the plaintiff declaring the child was a citizen of Malaysia by operation of law pursuant to art 14(1)(b) and Part II s 1(a) of the Second Schedule of the FC read with Part III s 19B of the Second Schedule of the FC (see paras 1, 54 & 60).

(5) Guided by *CCH*'s case and as prayed by the plaintiff, the court made no order as to costs although the court observed that the defendants were rather unkind to want to seek costs if the action had been dismissed bearing in mind that this was an action initiated for a relief accorded by the supreme law of the land, and avowed to be a fundamental liberty, and which was driven and underpinned by both the love and kindness for an abandoned baby. That the FC was the supreme law, was clearly provided by art 4(1) of the FC (see para 55).

(6) Based on the above findings, the court had made the declaration sought and pursuant to the power given to the High Court by s 1 of the Schedule to the Courts of Judicature Act 1964, the court made a consequential order to give effect to the declaration in the nature of a mandamus, directing the defendants to replace the second birth certificate signed by

the D1 which registered the child as a Non-Citizen with one, registering the child as a Citizen of Malaysia within 14 days of the order (see para 62).

[Bahasa Malaysia summary

Plaintif dalam kes ini adalah wakil litigasi dan ibu angkat kepada seorang kanak-kanak ('anak tersebut') yang ditinggalkan oleh ibu bapa kandungnya semasa dilahirkan. Anak tersebut dilahirkan di Damai Services Hospital HQ, Kuala Lumpur. Berikutan perintah pengangkatan yang diperoleh plaintif, anak tersebut telah diberikan sijil kelahiran baru ('sijil kelahiran kedua') di bawah s 25A Akta Pengangkatan 1952 ('AP') tetapi sijil kelahiran tersebut menyatakan bahawa anak tersebut bukan warganegara. Plaintif kemudiannya memfailkan saman pemula terhadap Ketua Pengarah Jabatan Pendaftaran Negara ('D1'), Kementerian Dalam Negeri ('D2') dan Kerajaan Malaysia ('D3') untuk perisytiharan bahawa anak tersebut adalah warganegara Malaysia melalui kuat kuasa undang-undang menurut perkara 14(1)(b) Perlembagaan Persekutuan ('PP') dan Bahagian II s 1(a) Jadual Kedua PP yang dibaca bersama s 19B Bahagian III Jadual Kedua PP.

Diputuskan:

(1) Peguam Kanan Persekutuan ('PKP') tentunya mengetahui undang-undang seperti yang ditetapkan dalam kes Mahkamah Persekutuan *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 ('kes *CCH*'). Ini jelas daripada afidavit pembetulan yang lewat difailkan oleh D1 yang mengatakan ia difailkan berdasarkan nasihat PKP dan cuba mencabar bahawa anak tersebut dilahirkan di Damai Service Hospital HQ Kuala Lumpur, sebuah tempat yang berada dalam Persekutuan dan jika diterima akan mencetuskan anggapan yang diperuntukkan secara perlembagaan oleh Bahagian III s 19B Jadual Kedua ('anggapan s 19B') (lihat perenggan 45).

(2) Mahkamah mendapati bahawa percubaan D1 untuk melepaskan diri daripada pengakuan awalnya bahawa anak tersebut dilahirkan di Damai Service Hospital HQ Kuala Lumpur adalah jelas pemikiran terkemudian kerana sijil kelahiran kedua yang menyatakan bahawa anak tersebut dilahirkan di Damai Service Hospital tidak ditarik balik oleh D1. Menurut s 25A(5) AP, sijil kelahiran kedua ini 'hendaklah menggantikan' sijil kelahiran sebelum pengangkatan dan 'hendaklah bagi segala maksud dikenali sebagai Sijil Kelahiran anak itu'. Selain itu, perintah pengangkatan turut menyatakan tempat kelahiran anak tersebut adalah di Damai Service Hospital. Juga tiada keterangan menunjukkan bahawa plaintif berbohong bahawa anak tersebut ditinggalkan. Oleh yang demikian, disebabkan oleh anggapan s 19B, beban untuk membuktikan

sebaliknya telah beralih kepada defendan-defendan (lihat perenggan 46 & 48).

(3) Dengan defendan-defendan tidak memanggil doktor yang dinamakan dalam sijil kelahiran, Datuk Dr Mahes Sitampalam dari Damai Service Hospital HQ Kuala Lumpur untuk memberi keterangan secara viva voce (lisan) atau meletakkan plaintif untuk pemeriksaan balas, mahkamah mendapati plaintif telah secara kredibel menafikan dakwaan defendan-defendan atas sebab-sebab yang dinyatakan di atas, dan anggapan s 19B yang beroperasi memihak kepada plaintif telah gagal untuk disangkal (lihat perenggan 50).

(4) Berdasarkan fakta dan mengguna pakai undang-undang yang telah ditetapkan oleh Mahkamah Persekutuan dalam kes *CCH* yang mana mahkamah terikat untuk mengikutinya atas sebab doktrin stare decisis, oleh kerana defendan-defendan telah gagal melepaskan beban pembuktian yang memerlukan mereka untuk menyangkal anggapan s 19B, mahkamah tidak teragak-agak dalam membenarkan permohonan pertama yang dipohon oleh plaintif untuk mengisytiharkan anak tersebut adalah warganegara Malaysia melalui kuat kuasa undang-undang menurut perkara 14(1)(b) dan Bahagian II s 1(a) Jadual Kedua PP dibaca bersama Bahagian III s 19B Jadual Kedua PP (lihat perenggan 1, 54 & 60).

(5) Berpandukan kes *CCH* dan seperti yang dimohon oleh plaintif, mahkamah tidak membuat perintah mengenai kos walaupun mahkamah mendapati bahawa adalah tidak baik untuk defendan-defendan memohon kos jika tindakan ditolak memandangkan ini adalah satu tindakan yang dimulakan untuk relif yang diberikan oleh undang-undang tertinggi negara, dan diakui sebagai kebebasan asasi, dan yang didorong dan disokong oleh kasih sayang dan kebaikan untuk bayi yang ditinggalkan. Fakta bahawa PP adalah undang-undang tertinggi, jelas diperuntukkan oleh perkara 4(1) PP (lihat perenggan 55).

(6) Berdasarkan dapatan-dapatan di atas, mahkamah telah membuat perisytiharan seperti yang dipohon dan menurut kuasa yang diberikan kepada Mahkamah Tinggi oleh s 1 Jadual kepada Akta Mahkamah Kehakiman 1964, mahkamah membuat perintah berbangkit untuk melaksanakan pengisytiharan berbentuk mandamus, mengarahkan defendan-defendan menggantikan sijil kelahiran kedua yang ditandatangani oleh D1 yang mendaftarkan anak tersebut sebagai Bukan Warganegara dengan satu sijil kelahiran yang mendaftarkan anak tersebut sebagai Warganegara Malaysia dalam tempoh 14 hari dari perintah tersebut (lihat perenggan 62).]

Cases referred to

CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71; [2022] 1 CLJ 1, FC (folld)

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236; [2021] 6 CLJ 471, FC (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212; [1979] 1 LNS 18, PC (refd)

Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474, FC (refd)

Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)

Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181; [2021] 3 CLJ 301, FC (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24, PC (refd)

Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 5 MLJ 662, CA (refd)

Legislation referred to

Adoption Act 1952 s 25A, 25A(2), (5)
Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution arts 4(1), 14(1)(b), 15A, Second Schedule, Part II, Chapter 1, ss 1(a), 1(e), 2(3), Part III, 19B
Rules of Court 2012 O 28 rr 4(2), (3), (4), 8(1)

Jasmine Wong Kah Man (with Ng Ker Chi) (Mah Weng Kwai Assoc) for the plaintiff.
Muhammad Fauzi bin Md Yusof (Senior Federal Counsel, Perak State Legal Advisor's Office) for the defendants.

Su Tiang Joo JC:

INTRODUCTION

[1] On the facts of this case and applying the law that has been settled by the Federal Court in *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71; [2022] 1 CLJ 1 ('CCH'), this court had allowed a declaration that the child who was registered as a non-citizen ('bukan warganegara'), is a citizen of Malaysia by operation of law pursuant to art 14(1)(b) read together with Part II, s 1(a) of the Second Schedule of the Federal Constitution and Part III, s 19B of the Second Schedule of the Federal Constitution. Dissatisfied, the defendants appealed, and these are the grounds of judgment.

A NATURE OF APPLICATION

[2] The plaintiff, YYM, is the litigation representative and the adoptive mother of MWX ('the child'). Just as in *CCH* their names are redacted in order to maintain anonymity.

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[3] The first defendant ('D1') is the Director General of the National Registration Department which is a department under the purview of the second defendant, the Ministry of Home Affairs ('D2'). Needless to say, both D1 and D2 comes under the overall purview of the third defendant, the Government of Malaysia.

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[4] One week after the child was said to be born at the Damai Service Hospital HQ, Kuala Lumpur on 15 June 2012, the child was handed over to the plaintiff who proceeded to look after the child as her own.

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[5] The plaintiff then formally applied to adopt the child, and an adoption order dated 6 October 2020 was made by the Sessions Court Kuala Lumpur in her favour pursuant to the Adoption Act 1952.

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[6] Subsequent to the adoption order, the child was issued with a new birth certificate under s 25A of the Adoption Act 1952 which states that the plaintiff is the child's mother (see exh 'A1', p 21 of encl 2).

F **[7]** However, the birth certificate states that the child is a non-citizen ('bukan warganegara').

[8] By way of an originating summons (encl 1), the plaintiff commenced an action for:

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(i) a declaration that the child is a citizen of Malaysia by operation of law pursuant to art 14(1)(b) and Part II, s 1(a) of the Second Schedule of the Federal Constitution read with Part III s 19B of the Second Schedule of the Federal Constitution;

H (ii) a declaration that the child is born of a mother who is a permanent resident in Malaysia pursuant to Part III s 19B of the Second Schedule of the Federal Constitution;

(iii) a declaration that the child is a citizen of Malaysia by operation of law by virtue of her birth within the Federation pursuant to art 14(1)(b) and Part II, ss 1(e) and 2(3) of the Second Schedule of the Federal Constitution;

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(iv) in the alternative to paragraph (i), a declaration that the child is a citizen of Malaysia by operation of law pursuant to art 14(1)(b) and Part II, s 1(a)

of the Second Schedule of the Federal Constitution by virtue of the citizenship status of her (adopted) parent, MYY and her birth certificate (Register No xxxx, Serial No yyyy) dated zzzz);

(v) a declaration that the child's birth certificate (Register No xxxx, Serial No yyyy) dated 28 December 2020 issued by the first defendant which registered the child as a non-citizen instead of a citizen of Malaysia is an unlawful violation of the child's rights as a citizen of Malaysia;

(vi) an order that the defendants reissue the child's birth certificate (Register No xxxx, Serial No yyyy) dated 28 December 2020 and register the child as a citizen of Malaysia within 14 days from the date of this order;

(vii) an order that the defendants issue the child with a MyKid within 14 days from the date of this order.

(viii) that the requirement of personal service of this order on the defendants be dispensed with and that service of this order be effected by personal service on the Attorney-General's Chambers;

(ix) there be no order as to costs; and

(x) such further orders and/or directions as may be given or made as this honourable court deems fit and just in the circumstances.

[9] The plaintiff's primary assertion is that the child is a Malaysian citizen by operation of law pursuant to art 14(1)(b) and Part II, s 1(a) of the Second Schedule of the Federal Constitution ('s 1(a) Second Schedule FC') read together with s 19B of Part III of the Second Schedule of the Federal Constitution ('s 19B').

[10] In support of her application, the plaintiff filed four affidavits (encls 2, 8, 12 and 13) and the defendants responded with three affidavits including a corrective affidavit (encls 7, 9 and 11).

[11] All references in this judgment to 'articles' and 'Second Schedule' are to that of the Federal Constitution ('FC'). Similarly, and unless otherwise stated, any references to Part II or Part III are to that of the Second Schedule of the FC.

THE LAW

[12] The right to citizenship is provided by Chapter 1 of Part II of the FC which carries the heading of 'Fundamental Liberties'. Article 14(1)(b) which comes under Chapter 1 as aforesaid, provides as follows:

(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

A (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

B **[13]** Part II s 1(a) of the Second Schedule ('Section 1(a) Second Schedule of the FC') provides as follows:

1. Subject to the *provisions of Part III of this Constitution,* the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

C (a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation;'

D **[14]** Section 19B of Part III of the Second Schedule ('s 19B') is reproduced below:

19B. For the purposes of *Part I and II of this Schedule* any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of
E this section as so born, the date of the finding shall be taken to be the date of the birth.

[15] Recently, a panel of the Federal Court comprising Tengku Maimun Tuan Mat (CJ), Nallini Pathmanathan, Mary Lim, Harmindar Singh and
F Rhodzariah Bujang (FCJJ), had considered the aforesaid provisions and delivered a seminal judgment in *CCH.*

[16] Given its importance to the present case, I will quote from the said judgment *in extenso.*

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[17] The Right Honourable Chief Justice of the Federal Court, Tengku Maimun bt Tuan Mat in her speech in delivering the unanimous decision of the Federal Court in *CCH* said:

H [50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the 'base' meaning. And when construing interrelated provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another.

I [51] With the above principles in mind, we now come to s 1(a) of Part II and s 19B of Part III.

[52] Section 1(a) of Part II very clearly adopts the concepts of jus soli (citizenship based on birthplace) and jus sanguinis (citizenship based on blood relation). Section

19B in turn contains two presumptions — one of which relate to jus sanguinis. A

[53] The operative words in s 19B are 'any newborn child found exposed in any place'. The purpose of this section, when read in context, must be to cover newborn children who are left and discovered in a place without any trace of their biological parents. We take judicial notice of the harsh realities of life: this includes newborn children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of 'exposed' suggests a newborn child who was 'discovered' exposed at any of these locations. B

[54] As such, the broadest possible interpretation of the word 'found exposed' is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word 'exposed' in s 19B must therefore encompass the plight of abandoned newborn children, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory. C

[55] In the present case, we took pains to emphasise that throughout the course of this case, it has been an accepted fact that the child is an abandoned child who was born in Hospital Universiti Kebangsaan Malaysia, Cheras. This fact was acknowledged in the adoption order and in the third birth certificate. During the hearing, learned SFC disagreed with the application of s 19B to the facts of this appeal, suggesting that the appellants had actively concealed facts, that the identity of the biological parents is known or discoverable but kept hidden. D E

[56] The simple answer to that assertion is this. The follow-up words in s 19B are contained in the phrase 'until the contrary is shown'. Meaning, any person who claims that the child was not 'found exposed' or otherwise abandoned by the mother as the case may be, bears the burden of showing the identity of the mother and more importantly, that the mother is not permanently resident at the place of the finding. F

[57] Evidence-wise, the answer to this predicament is in the recent judgment of this court in *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181; [2021] 3 CLJ 301 ('Rosliza') which deals with proof of negative facts. It is quite illogical in this appeal to expect the appellants to show that they do not have knowledge of the biological parents or the mother at least. This is what the appellants averred in their affidavit in reply dated 12 April 2019: G

> 4.5. In January 2004, we were informed by a friend that a baby boy (the child) has been born and abandoned at Hospital University Kebangsaan Malaysia, Cheras. We decided to adopt the child and named him CYM ... H

[58] There is nothing in the evidence, as far as we have examined it, to suggest that the appellants were lying about the fact of abandonment. According to s 19B therefore, the burden of showing that the child's mother was not permanently resident at the place of finding rests on the respondent. Given that the child was born in the said hospital, surely the respondent has the means to verify from the hospital's admission records, the identity of the child's biological mother, if not the father. Therefore, as the record stands, the respondent has not been able to discharge that burden. No affidavit has been deposed nor a modicum of evidence adduced to suggest that the narrative provided by the appellants is inherently incredible or even false or untrue. I

[59] This leads us now to the final portions of s 19B. Once it is shown or averred that a newborn child is 'found exposed' (or abandoned), two things are presumed, that is:

(i) that the child is born to a mother who is permanently resident at the place where the finding was made (the *jus sanguinis* presumption); and

(ii) the date of the finding is taken as the date of the birth.

[60] Once s 19B is invoked, any party challenging any of these presumptions must either show that: (i) the child was not born of a mother permanently resident at the place where the newborn child was found; or (ii) the date of the finding is not the date of the birth. It is really only a contest on the earlier which determines citizenship because of the wording of s. 1(a) which requires that a child born within the Federation to be born of at least either one parent who is either a citizen or, more important to this case, of a parent permanently resident in the Federation.

[61] Putting it another way, the place of the finding, if within the Federation would satisfy the jus soli requirement of s 1(a) of Part II. The presumption, once it applies, automatically serves to complete the jus sanguinis (parenthood) aspect of s 1(a) unless anyone claiming to the contrary can prove otherwise.

[62] Hence, what remains at this stage is a simple application of the law to the facts of the case. Since the child was found abandoned in the location aforementioned, it is presumed that he was born to a mother permanently resident there. It follows that he is taken to fulfil the requirements of s 1(a) of Part II read with s 19B of Part III as he, having been born at Hospital Universiti Kebangsaan Malaysia, was born within the Federation and his mother is presumed to be permanently resident in the Federation.

[63] In the premises, it is our judgment that the child is quite simply entitled to citizenship by operation of law by virtue of s 1(a) of Part II read with s 19B of Part III.

[18] With that we turn to the facts.

THE PLAINTIFF'S CASE

[19] The plaintiff asserted that the child was born on 15 June 2012 at Damai Service Hospital HQ, Kuala Lumpur, and that the child was abandoned by her biological parents at birth.

[20] In support of her assertion that the child was born at Damai Service Hospital HQ, Kuala Lumpur the plaintiff:

(a) made a positive averment to this effect in her Affidavit in support (encl 2 paragraph 10);

(b) exhibited the child's first birth certificate which states that the child was born on 15 June 2012 at Damai Service Hospital HQ Kuala Lumpur (encl 8 para 6.1);

(c) deposed that the child's first birth certificate issued by D1 and carrying a registration date of 20 July 2012 states that the place of birth of the child is Damai Service Hospital HQ Kuala Lumpur (encl 8 exh A4 pdf p 14/16);

(d) deposed that the child's second birth certificate extracted from D1's records carry a similar place of birth for the child (encl 8 exh A5 p 16/16);

(e) made a positive averment that *after D1 carried out an investigation to secure confirmation of the child's birth* at Damai Service Hospital Kuala Lumpur, D1 issued the second birth certificate which said that the place of birth is Damai Service Hospital Kuala Lumpur (encl 8 para 5.1 and exh A-5, see the box for Place of Birth pdf p 16/16);

(f) made a positive averment that the place of birth of the child remains unamended after the conclusion of D1's investigation (encl 8 para 5.2);

(g) exhibited the schedule provided by D1 which is prescribed by s 25A(2) of the Adoption Act 1952 and filed in the adoption proceedings of the child where under column 2, the date and country of birth of the child it is stated as 15 Jun 2012 at Damai Service Hospital HQ, Kuala Lumpur (encl 2 exh A-2 pdf p 26/28); and

(h) repeated this positive averment in paras 18, 22.1, 23 of her affidavit in support (encl 2).

[21] Section 25A(2) of the Adoption Act 1952 provides as follows:

> (2) Upon receipt of an adoption order, the Registrar-General shall, subject to due compliance with paragraph (1) (b) and the payment by the adopter of the prescribed fee, issue a Certificate of Birth in respect of the child in the form set out in the Second Schedule.

A

SECOND SCHEDULE

[Subsection 25A(2)]

B

JPN GOVERNMENT OF MALAYSIA BIRTH CERTIFICATE		
Registration Area		Registration Centre
CHILD		
Name		
Date and Time of Birth		Sex
Place of Birth		Citizenship Status
FATHER		
Name		
Identity Card Number	Age	Type of and Other Document No.
Status of Residence		Religion
MOTHER		
Name		
Identity Card Number	Age	Type of and Other Documents No.
Status of Residence		Religion
Place of Residence		
Register No.: Date of Registration: Register of Birth Certificated No.: Reference No.: Serial No.:		It is certified that the above information is correct ....

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[22] According to the plaintiff, when the child was a week old, an acquaintance (whom the plaintiff only knows as 'W') handed the child over to the plaintiff (encl 2 para 11).

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[23] W informed the plaintiff that the child's biological parents had abandoned the child as they could not afford to raise and take care of the child (encl 2 para 11).

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[24] The plaintiff has no knowledge of how the child came into the custody of the acquaintance.

[25] The plaintiff does not know the identity of the child's biological parents, and has never met the child's biological parents (encl 2 para 12).

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[26] The plaintiff averred that she has been taking care of the child and raising her ever since she was a week-old baby (encl 8 para 6.2).

[27] The plaintiff then adopted the child under the Adoption Act 1952 by an adoption order dated 6 October 2020 made by the sessions court pursuant to the Adoption Act 1952 (encl 2 para 13).

[28] However, although the (second) birth certificate issued by D1 states that the child was born at Damai Service Hospital, it also states that the child is a non-citizen ('bukan warganegara').

[29] The plaintiff asserts that the child is a Malaysian citizen by operation of law pursuant to art 14(1)(b) and Part II, s 1(a) of the Second Schedule ('s 1(a) Second Schedule') read together with s 19B of Part III of the Second Schedule ('s 19B').

[30] Reliance is made by the plaintiff upon the Federal Court authority of *CCH* where the Federal Court held that an abandoned child who was born in Malaysia and whose biological parents are unknown is entitled to Malaysian citizenship by operation of law under s 1(a), Second Schedule of the FC read with s 19B.

[31] Applying the principles laid down in *CCH*, the plaintiff asserted that the plaintiff's case are on all fours with *CCH*. The plaintiff put up a table reproduced below to show the similarities of her case with that of *CCH*):

CCH	Present case
The child was an abandoned child who was born in Hospital Universiti Kebangsaan Malaysia, Cheras.	The child was an abandoned child who was born in Damai Services Hospital HQ, Kuala Lumpur.
The child's biological parents are unknown.	The child's biological parents are unknown.
The applicants adopted the child under the Adoption Act 1952 in the Pulau Pinang High Court.	The plaintiff adopted the child under the Adoption Act 1952 in the Ipoh Sessions Court.
The respondent registered the child as a non-citizen.	The defendants registered the child as a non-citizen.

THE DEFENDANTS' CASE

[32] In resisting the plaintiff's action, D1 initially *admitted* that the child was born at Damai Service Hospital HQ Kuala Lumpur (encl 7 para 9). Given the importance of this admission, I set it out in its original language:

> Perenggan 10 Afidavit Sokongan tersebut adalah diakui setakat pengataan bahawa anak Plaintif dilahirkan pada 15.6.2012 di Damai Service Hospital Kuala Lumpur.

[33] However, D1 had a change of heart and averred that he has been advised

by the Senior Federal Counsel to deny para 10 of the plaintiff's Affidavit in its entirety and to put the plaintiff on strict proof thereof (see D1's corrective affidavit in encl 11 para 4).

[34] D1 went on to aver that after carrying out follow-up investigations to obtain confirmation of the child's birth at the Damai Service Hospital Kuala Lumpur, and from a survey of the said premises, they found that such premises exist (encl 11 para 4.2), and that the doctor named in the birth certificate as the doctor who had delivered the child, one Datuk Dr Mahes Sitampalam, do exist (encl 11 para 4.2).

[35] However, this Datuk Dr Mahes Sitampalan did not confirm that the birth of the child took place at Damai Service Hospital (encl 11 para 4.3).

[36] A perusal of the record of births at the said hospital show that there was only one record of a birth having taken place on 15 June 2012 (encl 11 para 4.4). However, the time of birth was 8:43am which is different from the time of birth set out in the birth certificate of the child which expressed it to be 10:21am and the parents of the baby delivered, are of Indian Punjabi (Sikhs) ethnicity who are Malaysian citizens. A copy of the memorandum to confirm this birth at Damai Service Hospital at 8:43am dated 15 June 2022 was produced and exhibited (encl 11 para 4.4 and exh RJ1).

[37] The defendants asserted that the form used by the plaintiff to confirm the birth of the child when registering the child is different from the form used by Damai Service Hospital and samples of those used by Damai Service Hospital were exhibited (encl 11 para 4.5 exhs RJ2 and RJ3 pdf 8/19 to 16/19) to show the difference so as to postulate the unsaid inference that the forms relied upon by the plaintiff were forged.

[38] The defendants also averred that with the plaintiff having applied for citizenship pursuant to art 15A of the FC, and which is still under consideration, the plaintiff's action is premature and ought to be dismissed (encl 9 paras 5–6).

[39] This court observed that the defendants admit that this application has been put in since 2 February 2021(encl 2 para 27 and encl 9 para 5).

[40] Article 15A of the FC provides as follows:

> ... Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

[41] The defendant asserted that the approval of the plaintiff's application under art 15A was subject to the discretion of the Minister of Home Affairs and any decision of the Minister pertaining to this application is non-justiciable as provided by s 2, Part III of the Second Schedule which is reproduced hereunder:

> ... A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.

COURT'S ANALYSIS AND FINDINGS

[42] The proceedings in this case was by way of originating summons and not by way of writ. Therefore, the action would be tried by way of evidence led by way of affidavits. This means that in the event of any conflict of evidence on affidavits, I have a discretion which must be exercised judicially 'to determine in the first instance whether statements contained in the affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth', see *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217; [1979] 1 LNS 18 (PC) as per Lord Diplock. See also *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24 (PC).

[43] The aforesaid approach in dealing with conflict of evidence on affidavit was followed by our Federal Court in *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997 (FC).

[44] In my considered view, the Federal Court in *CCH* has made it crystal clear in words that bear repeating that:

> [55] In the present case, we took pains to emphasise that throughout the course of this case, *it has been an accepted fact that the child is an abandoned child who was born in Hospital Universiti Kebangsaan Malaysia, Cheras. This fact was acknowledged in the adoption order and in the third birth certificate. During the hearing, learned SFC disagreed with the application of s 19B to the facts of this appeal, suggesting that the appellants had actively concealed facts,* that the identity of the biological parents is known or discoverable but kept hidden.
>
> [56] *The simple answer to that assertion is this. The follow-up words in s 19B are contained in the phrase 'until the contrary is shown'. Meaning, any person who claims that the child was not 'found exposed' or otherwise abandoned by the mother as the case may be, bears the burden of showing the identity of the mother and more importantly, that the mother is not permanently resident at the place of the finding.* (Emphasis added.)

[45] The senior federal counsel ('SFC') must be aware of the law as laid down in *CCH*. This is clear from the belated corrective affidavit filed by D1 (encl 11) who said it is filed based upon the advice of the SFC and seeking to

challenge that the birth of the child took place at Damai Service Hospital HQ Kuala Lumpur, a place which is within the Federation and if accepted would trigger the presumption constitutionally provided by Part III s 19B of the Second Schedule ('s 19B presumption').

[46] I find D1's attempt to resile from his earlier admission of the fact that the child was born at Damai Service Hospital HQ Kuala Lumpur is clearly an afterthought for the following reasons:

(a) there is no accompanying withdrawal of the second birth certificate issued by D1 to the plaintiff which clearly said that the place of birth of the child is Damai Service Hospital Kuala Lumpur;

(b) despite the plaintiff having made a positive averment on affidavit that the second birth certificate was issued *after* D1 had carried out his investigations, there was no rebuttal or at least an explanation why D1 was still content to accept that the place of birth in the second birth certificate issued by him carries the place of birth as the Damai Service Hospital Kuala Lumpur;

(c) save for a bare averment by D1 that his investigations revealed that there was a birth recorded of a baby to Malaysian citizens of Indian Punjabi ethnicity at the Damai Service Hospital Kuala Lumpur on the day as that of the child on 15 June 2012, strangely, the birth certificate of this alleged [other] baby was not produced and exhibited;

(d) just as in *CCH*, the adoption order has the place of birth of the child as the Damai Service Hospital HQ Kuala Lumpur;

(e) there was no dispute on the factual assertion that the child was brought up by the plaintiff as from the time the child was a week old;

(f) indeed, as in *CCH*, I find no evidence to show that the plaintiff was lying that the child was abandoned;

(g) the burden to prove to the contrary has shifted to the defendants by reason of the s 19B presumption but no attempts were made by the defendants to apply for the action to be converted into a writ or to have this alleged factual dispute determined by oral evidence with witnesses subjected to cross-examination pursuant to the O 28 rr 4(2), (3), (4) and 8(1) of the Rules of Court 2012 which provides as follows:

> ...4 (2) Unless on the first hearing of an originating summons the Court disposes of the originating summons altogether or orders the cause or matter begun by it to be transferred to a Subordinate Court or makes an order under rule 8, the Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.
>
> (3) Without prejudice to the generality of paragraph (2), the Court shall, at as

early a stage of the proceedings on the originating summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the originating summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the originating summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct.

(4) Without prejudice to the generality of paragraph (2), and subject to paragraph (3), the Court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination and any other directions.

8(1) Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(h) as submitted by the plaintiff, which I agree, it would be contradictory and inconsistent for a new born child who is found at a dumpsite or by the side of the road after being abandoned would be recognised as a citizen, whereas a child who is left at a hospital or for that matter, a baby hatch by the child's [biological] mother, and I would add, who cannot be traced, would not. See for e.g. the baby hatches operated by OrphanCare where the deposit of the baby is said to be done in an air-conditioned hatch with a 24 hours CCTV *which does not identify* the mother — (https://orphancare.org.my/baby-hatch/).

[47] In any event, in my considered view, the challenge that the defendants sought to raise on where the child was in fact found abandoned is, with respect, a blinkered one.

[48] It is to be observed that the second birth certificate issued by D1 post the adoption order carries the place of birth to be Damai Service Hospital HQ Kuala Lumpur. Pursuant to s 25A(5) of the Adoption Act 1952 this second birth certificate 'shall replace' the pre-adoption (or first) birth certificate and '*shall for all purposes* be known as the Certificate of Birth of the child'. (Emphasis added.).

[49] In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24, Lord Templeman speaking for the Privy Council said that:

If allegations are made in affidavits by the petitioner and those allegations are

credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegation.

[50] By reason of the s 19B presumption operating in favour of the plaintiff, the burden to disprove the plaintiff's averments lay on the defendants. With the defendants not calling Datuk Dr Mahes Sitampalan of Damai Service Hospital HQ Kuala Lumpur to give viva voce (oral) evidence or subjecting the plaintiff to cross examination, I find the plaintiff has credibly denied the defendants' allegations for the reasons I have set out above, and that the s 19B presumption which operates in favour of the plaintiff has not been rebutted.

[51] With respect, the defendants would have been well advised instead, to use the vast resources at their disposal, to make timely efforts to ascertain whether the child was born outside the Federation or to trace the biological parents or at least the biological mother of the child if they are so minded, because with the child found abandoned or exposed within the Federation, the s 19B presumption operates in favour of the plaintiff and it does not lie upon the plaintiff to prove a negative fact, namely, that the child was not born within the Federation or that she does not know who is the biological mother, see *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181; [2021] 3 CLJ 301 at para [45] (a case referred to in *CCH* where it was held that:

> ... Surely, where there is no proof of a fact, the more logical conclusion is to believe in its non-existence. In this regard, the aforementioned s 102 of the Evidence Act 1950 is apposite because 'the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. The conclusion is also fortified by the definition of the word 'proved' in s 3 of the Evidence Act 1950 which provides:
>
> > a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists ...

[52] The plaintiff has positively averred she has no knowledge how the child came into the custody of her friend who had handed the then one-week old child to her (encl 2 para 11). The plaintiff had also deposed she has no knowledge of the identity of the child's biological parents (encl 2 para 12). On the other hand, no evidence was led by the defendants to prove that the child was born outside the Federation or who is the child's biological parents or at least, the child's biological mother.

[53] Again at the risk of being repetitive, the Federal Court had made it clear that:

A

> [53] *The operative words in s 19B are 'any newborn child found exposed in any place'. The purpose of this section, when read in context, must be to cover newborn children who are left and discovered in a place without any trace of their biological parents. We take judicial notice of the harsh realities of life: this includes newborn children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of 'exposed' suggests a newborn child who was 'discovered' exposed at any of these locations.*
>
> [54] *As such, the broadest possible interpretation of the word 'found exposed' is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word 'exposed' in s 19B must therefore encompass the plight of abandoned newborn children, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory.* (Emphasis added.)

B

C

[54] On the facts that obtain and applying the law which has been settled by the Federal Court in *CCH*, with the defendants having failed to discharge the burden of proof which lay on them to rebut the s 19B presumption, I have no hesitation in granting the first prayer sought by the plaintiff declaring the child is a citizen of Malaysia by operation of law pursuant to art 14(1)(b) and Part II, s 1(a) of the Second Schedule of the Federal Constitution read with Part III, s 19B of the Second Schedule of the Federal Constitution.

D

E

[55] Similarly, as guided by the case of *CCH* and as prayed by the plaintiff, I made no order as to costs although I observed that the defendants were rather unkind to want to seek costs if the action had been dismissed bearing in mind that this is an action initiated for a relief accorded by the supreme law of the land, and avowed to be a fundamental liberty, and which is driven and underpinned by both the love and kindness for an abandoned baby. That the FC is the supreme law, is clearly provided by art 4(1) of the FC which is reproduced hereunder:

F

> This is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

G

END NOTES

H

[56] In this action, comprehensive written submissions were filed with bundles of authorities referred to. The plaintiff and the defendants, each filed a set of primary submissions (encls 14 and 18 respectively) as well as a set of submissions in reply (encls 21 and 23).

I

[57] Each side had made reference to *CCH* with the plaintiff relying heavily on it whilst the defendants sought to distinguish *CCH* by relying on the factual challenge that the child was not delivered by the doctor in Damai Service Hospital HQ Kuala Lumpur as claimed by the plaintiff but which I have found

to be insufficient to displace the s 19B presumption.

[58] The defendants have made extensive references to the Court of Appeal authority of *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 wherein the doctrines of *jus soli* and *jus sanguinis* were explained in detail but with respect, these concepts are encapsulated in the FC as found by *CCH*.

[59] For the sake of completeness, I would add that this case is not one of the acquisition of citizenship by operation of law of an illegitimate child born out of the Federation as was determined by the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ 471.

[60] I mean no discourtesy to both the learned counsel for the plaintiff and the learned SFC for not addressing the other issues raised and authorities cited in this judgment but in my view, with the law being settled on the relief sought in the first prayer, and this court bound to follow *CCH* by reason of the doctrine of stare decisis, the marshalling of the facts in this case carries greater import, and the other issues which have been considered can be comfortably side-lined so as to avoid this judgment becoming prolix.

[61] Given the facts I have found, it would be useful to refer to the reminder by the Federal Court on the doctrine of stare decisis in *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474 where the Federal Court said:

> [211] The importance of adherence to the doctrine of stare decisis lies in the fact that it has become the cornerstone of the common law practiced in this country. It is fundamental that decisions of the courts, especially of the apex court, ought to be consistent, in the interests of finality and certainty in the law. Otherwise, the public and lawyers who have regulated their affairs in reliance on a ratio decidendi before it is overruled will face difficulty and confusion in organizing their affairs around such judgments and this in turn will affect public confidence in the Judiciary (see *Dato' Tan Heng Chew v Tan Kim Hor & Another Appeal* [2006] 2 MLJ 293; [2006] 1 CLJ 577; *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276; [1980] 1 LNS 58. See also *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577.

CONCLUSION

[62] Wherefore, I had made the declaration sought and pursuant to the power given to the High Court by s 1 of the Schedule to the Courts of Judicature Act 1964, I made a consequential order to give effect to the declaration in the nature of a mandamus, directing the defendants to replace

the second birth certificate signed by the first defendant which registered the child as a non-citizen ('bukan warganegara') with one, registering the child as a citizen ('warganegara') of Malaysia within 14 days of the order.

Order accordingly.

Reported by Dzulqarnain Ab Fatar